Office-Supreme Court, U.S.
FILED
MAY 1 1981
ALEXANDER L. STEVAS,
CLERK

No. 80-1681

In the
Supreme Court of the United States
October Term, 1980

VILLAGE OF HOFFMAN ESTATES, ILLINOIS, ET. AL.,

Appellants,

vs.

THE FLIPSIDE, HOFFMAN ESTATES, INC., an Illinois corporation,

Appellee.

On Appeal From The United States Court Of Appeals For The Seventh Circuit.

MOTION TO AFFIRM

Stroup, Goldstein, Jenkins & Pritzker
Michael L. Pritzker
R. Brent Daniel
134 North LaSalle Street
Suite 2100
Chicago, Illinois 60602
(312) 372-2225
Counsel for the Appellees.

The Scheffer Press, Inc.—(312) 263-6850

TABLE OF CONTENTS

PAGE

Table of Authorities i

Motion to Affirm 1

The Ordinance Involved and the Nature of the Case .. 2

No Substantial Constitutional Issue Is Raised and the Sound Decision of the Court of Appeals Should be Affirmed 6

Conclusion 17

Appendix:

Ordinance 969-1978 and Guidelines 1a

TABLE OF AUTHORITIES

Cases:

Back Door Records v. *City of Jacksonville*, No. LR-C-80-314 (E.D. Ark. Jan. 8, 1981) 16

Colten v. *Kentucky*, 407 U.S. 104 (1972) 13, 14

Flipside, Etc. v. *Village of Hoffman Estates*, 485 F. Supp. 400 (N.D. Ill. 1980) 5

Flipside, Etc. v. *Village of Hoffman Estates*, 639 F.2d 373 (7th Cir. 1981) .....*passim*

Gaffey v. *Babb*, No. CA-13882 (Ct.App. Or. Feb. 23, 1981) 16

Geiger v. *City of Eagan*, 618 F.2d 26 (8th Cir. 1980) 13

General Store, Inc. v. *City of Albuquerque*, No. 81-0027-M (D.N.M. March 23, 1981) 16

Grayned v. *City of Rockford*, 408 U.S. 104 .....8, 10

Lazy J., Ltd. v. *The Borough of State College*, No. 80-1167 (M.D.Pa. Jan. 30, 1981) 16

PAGE

Leary v. *United States*, 395 U.S. 6 (1969) 8, 9, 10

Magnani v. *City of Ames*, 493 F.Supp. 1003 (S.D.Ia. 1980) 15

McGowan v. *Maryland*, 366 U.S. 420 (1960) 8, 15

Music Stop v. *City of Ferndale*, 488 F.Supp. 390 (E.D.Mich. 1980) 15

Record Revolution, No. 6 Inc. v. *City of Parma et al.*, 639 F.2d 916 (6th Cir. 1980) 16

Rose v. *Locke*, 423 U.S. 48 (1975) 13, 14

The Town Tobacconist v. *Degnan*, No. C-2198-80 (Super. Ct.Ch.N.J. March 12, 1981) 16

Weiler v. *Carpenter*, No. 80-637-JB (D.N.M. Feb. 11, 1981) 16

Statutes and Ordinances:

28 U.S.C. §2201 4

28 U.S.C. §2202 4

42 U.S.C. §1983 4

Ill.Rev.Stat., Ch. 23, §2357 11

Ill.Rev.Stat., Ch. 56½, §1312 .....11, 12, 13

Village of Hoffman Estates, Municipal Code, Ordinance No. 969-1978 and Guidelines .....*passim*

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

No. 80-1681

VILLAGE OF HOFFMAN ESTATES, ILLINOIS, a Municipal Corporation; VIRGINIA M. HAYTER, Individually and in her official capacity as President of the Village of Hoffman Estates, Illinois; RICHARD WILLIAMS, Individually and in his official capacity as Attorney for the Village of Hoffman Estates, Illinois; JOHN O'CONNELL, Individually and in his official capacity as Chief of Police for the Village of Hoffman Estates, Illinois; and the following, Individually and in their official capacity as Trustees for the Village of Hoffman Estates, Illinois: WILLIAM W. COWIN, WILLIAM A. PALMER, BRUCE C. LIND, RALPH H. LYERLA, THOMAS W. TAYLOR and LEE DODGION,

Appellants,

vs.

THE FLIPSIDE, HOFFMAN ESTATES, INC., an Illinois corporation,

Appellee.

On Appeal From The United States Court Of Appeals For The Seventh Circuit.

MOTION TO AFFIRM

The Appellee, The Flipside, Hoffman Estates, Inc., an Illinois Corporation (Flipside), respectfully moves this

Honorable Court, pursuant to Rule 16(1)(c) of the Rules of the Supreme Court of the United States, to affirm the judgment of the United States Court of Appeals for the Seventh Circuit on the grounds that it is manifest that the questions on which the decision of the cause depends are so unsubstantial and the decision below so plainly correct as not to warrant further argument.

THE ORDINANCE INVOLVED AND THE NATURE OF THE CASE

On February 20, 1978, the Village of Hoffman Estates Board of Trustees (Village) enacted Ordinance No. 969-1978, entitled "An Ordinance Amending the Municipal Code of the Village of Hoffman Estates by Providing for Regulation of Items Designed or Marketed for Use with Illegal Cannabis or Drugs," to be effective May 1, 1978. (The Ordinance and Guidelines are appended hereto). The ordinance provides that persons engaged in the business of retailing any "item, effect, paraphernalia, accessory or thing which is designed or marketed for use with illegal cannabis or drugs" must obtain a license in order to do so. An applicant must pay a $150 fee and also provide affidavits establishing that every employee authorized to sell such items has never been convicted of a drug related offense. The ordinance requires a licensee to maintain a police register containing the name and address of every purchaser, the time and date of purchase, and the signature of the selling licensee or his agent. The police register must be kept available for police inspection during business hours for two years following the respective dates of purchase. The acknowledged purpose of the police register was to discourage the purchase of anything deemed "designed or marketed for use with illegal cannabis or drugs." The ordinance

totally bans the transfer of items so deemed to persons under eighteen years of age. A violation of the ordinance is punishable by a fine of not less than $10 or more than $500, and each day a violation continues constitutes a separate offense. In the opinion of the Village officials prior to the enactment of the ordinance, Flipside Records was the only merchandiser in the Village that would be subject to the ordinance.

The Village also issued guidelines defining the terms of the ordinance and which were intended to be read in conjunction with it. The guidelines provide that cigarette rolling papers that are of "colorful design" (as opposed to white cigarette rolling papers), cigarette rolling papers with trade names "oriented for use with illegal cannabis or drugs," and all "roach clips" are *per se* within the purview of the ordinance. Pipes and "paraphernalia" fall within the coverage of the ordinance when they are displayed in "proximity" to "literature encouraging illegal use of cannabis or illegal drugs" or "roach clips."

Flipside is an Illinois corporation that owns and operates a business known as Flipside Records in the Village of Hoffman Estates. Since opening in 1976, Flipside Records has sold phonograph records, recording tape, clothing, jewelry, decorative mirrors, tobacco-smoking and snuff accessories (including white and non-white cigarette rolling papers), as well as a variety of literature including "National Lampoon," "Rolling Stone" and "High Times."

After agents of the Village notified Flipside personnel that the store was covered by the ordinance, Larry Rosenbaum, an officer of Flipside, telephoned Richard Williams, Hoffman Estates Village Attorney, and inquired what

items in his store were covered by the ordinance. Mr. Williams advised Mr. Rosenbaum to use the police register for all items, for his protection.

Flipside initiated proceedings in the United States District Court for the Northern District of Illinois, Eastern Division, on May 30, 1978, seeking a declaratory judgment that the ordinance violated the First, Fourth, Fifth, Eighth and Fourteenth Amendments, Article I, §8, Clause 3 and Article I, §10 of the United States Constitution pursuant to 42 U.S.C., §1983 and 28 U.S.C. §§2201 and 2202; and further seeking temporary, preliminary and permanent injunctive relief and damages pursuant to 42 U.S.C., §1983 for the actions of the Village and its agents, under color of law, which caused Flipside to be deprived of rights secured to it by the United States Constitution.

On May 30, 1978, the Honorable George N. Leighton denied Flipside's emergency motion for a temporary restraining order; and on September 1, 1978 denied Flipside's motion for preliminary injunction.

The trial for permanent injunction and declaratory judgment was held on March 23, 1979. The evidence and stipulated testimony established that no expert reports or statistics had been submitted to either the Committee on Health, Safety and Welfare or the Board of Trustees which would have provided a factual basis for the conclusion upon which the ordinance and guidelines were based. Neither the Village Attorney, who drafted the ordinance and guidelines, nor the Village President, who cast the tie-breaking vote enacting the ordinance, could specifically state which of the myriad exhibits in evidence at trial were covered by the ordinance, and both admitted they would have to rely on police opinion to inform them which objects were presumed to be "designed or marketed

for use with illegal cannabis or drugs." None of the witnesses were able to specify any unique structural design characteristics distinguishing ordinary items from "drug paraphernalia." The intended impact of the ordinance was shown instead to be a merchant's "manner of marketing." Under the ordinance and guidelines the proximity of literature deemed to encourage the "illegal use of cannabis or illegal drugs" to items not otherwise covered activates the requirement of a license, the police register and other attendant penalties. Further, the presence of any of the *per se* items noted in the guidelines, e.g. colored cigarette rolling papers, would extend the applicability of the ordinance's provisions to surrounding items not otherwise regulated. Also, evidence established that the presence of a phrase or symbol suggesting possible association with controlled substances would likewise trigger the ordinance. All of the witnesses admitted that specific determinations as to what items from time to time were to be considered covered by the ordinance would be left to the unguided judgment of the police.

On February 11, 1980, the trial court entered a Memorandum Order awarding judgment to the Village. After various post-trial motions, a timely notice of appeal was filed, and after full briefing and oral argument, the United States Court of Appeals for the Seventh Circuit, on January 12, 1981, reversed the judgment of the District Court. The Village's petition for rehearing was denied on February 12, 1981. The Village's Jurisdictional Statement was filed in this Honorable Court on April 3, 1981 and docketed as case No. 80-1618. The Memorandum Order of the trial court is reported at 485 F.Supp. 400 (N.D. Ill. 1980); and the Opinion of the Seventh Circuit is reported at 639 F.2d 373 (7th Cir. 1981).

NO SUBSTANTIAL CONSTITUTIONAL ISSUE IS RAISED, AND THE SOUND DECISION OF THE COURT OF APPEALS SHOULD BE SUMMARILY AFFIRMED

The Appellee, Flipside, submits to this Honorable Court that the decision of the United States Court of Appeals properly resolved the merits of this litigation on the basis of time-honored and well established tenets of Constitutional law. Although the Seventh Circuit addressed only one of the several Constitutional defects manifest on the face of the subject ordinance, the grounds of the opinion are so plainly correct, and the serious potential for abuse noted therein is so well supported in the record that no remand for determination of the undecided Constitutional violations asserted is necessary.

The Seventh Circuit set forth the sound and well-known underpinnings of its decision, stating:

> In *Grayned* v. *City of Rockford,* 408 U.S. 104, 92 S.Ct. 2294, 33 L.Ed.2d 222 (1972), the Supreme Court set out the policies behind the due process doctrine of vagueness. In a passage cited in virtually every opinion dealing with vagueness challenges to statutes or ordinances, the Court stated:
>
> > It is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined. Vague laws often offend several important values. First, because we assume that a man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warnings. Second, if arbitrary and discriminatory enforcement is to be prevented, laws must provide ex-

> plicit standards for those who apply them. A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application.

Id. at 108-09, 92 S.Ct. at 2298-99 (footnotes omitted). See also *Smith* v. *Goguen*, 415 U.S. 566, 572, 94 S.Ct. 1242, 1246, 39 L.Ed.2d 605 (1974); *Connally* v. *General Construction Co.*, 269 U.S. 385, 391, 46 S.Ct. 126, 127, 70 L.Ed. 322 (1926).

This ordinance is subject to attack for vagueness despite the fact that it is an ordinance, not a statute, and it purports to license, not prohibit, sale of "items designed or marketed for use with illegal cannabis or drugs." A law may run afoul of the vagueness doctrine even though it does not impose criminal sanctions because the fundamental defect is not the penalty but rather "the exaction of obedience to a rule or standard . . . so vague and indefinite as really to be no rule or standard at all." *A.B. Small Co.* v. *American Sugar Refining Co.*, 267 U.S. 233, 239, 45 S.Ct. 295, 297, 69 L.Ed. 589 (1925). The lack of a criminal penalty in the ordinance does not excuse vagueness where the effect is to deprive persons of constitutional rights. *Giaccio* v *Pennsylvania*, 382 U.S. 399, 402, 86 S.Ct. 518, 520, 15 L.Ed.2d 447 (1966) ("this state Act whether labeled 'penal' or not must meet the challenge that it is unconstitutionally vague"). See also *Benee* v. *Breier*, 501 F.2d 1185, 1188 (7th Cir. 1974), cert. denied, 419 U.S. 1121, 95 S.Ct. 804, 42 L.Ed.2d 821 (1975); *Soglin* v. *Kauffman*, 418 F.2d 163, 166-67 (7th Cir. 1969). Furthermore, in determining whether a civil or criminal enactment is sufficiently clear that persons affected can determine what the law requires of them, the same rules of construction apply whether it is a statute or an ordinance. *Martin* v. *King*, 417 F.2d 458, 461 (10th Cir. 1969).

Flipside Etc. v. *Village of Hoffman Estates,* 639 F.2d 373, 377-78 (7th Cir. 1981). The Appellee contends that it is manifest that no novel constructs or doctrines bore on the decision of the Seventh Circuit and that no substantial issue of constitutional law is presented by this case.

The Appellants concede that the Circuit Court properly utilized the principles expounded in *Grayned* v. *City of Rockford,* 408 U.S. 104 (1972), but argues that the Circuit Court should have validated the ordinance nevertheless on the basis of *Leary* v. *United States,* 395 U.S. 6 (1969) and *McGowan* v. *Maryland,* 366 U.S. 420 (1960). (Jurisdictional Statement p.5). It is apparently the Appellants' position that the *Leary* case supports and justifies the ordinance's presumption that a police determination regarding a particular marketing arrangement necessarily implies that all items displayed in spatial proximity thereto are "designed or marketed for use with illegal cannabis or drugs;" and that the *McGowen* case dispenses with the need for specificity and fair warning of what the law requires by simply imposing a burden of locating and surveying the preferences of drug abusers upon the target merchants. The Appellee will argue that the Seventh Circuit quite properly dismissed any contention that (1), from some undefined marketing scheme or display, it could be inferred with "substantial assurance" that any or all of the items therein contained, and indeed, the entire business, was engaged in distributing items "designed or marketed for use with illegal cannabis or drugs," *Leary* v. *United States, supra,* at 36; and (2), that the Seventh Circuit quite properly dismissed the notion of imposing a "merchant standard" upon persons alleged to be in the business of

selling items "designed or marketed for use with illegal cannabis or drugs" as being obviously circular, *i.e.,* for the standard to apply the licensee must be presumed a merchant of items designed or marketed to violate the law. The Appellee respectfully submits that no contention raised in the Appellants' Jurisdictional Statement raises a substantial federal question and all were cogently resolved by the Seventh Circuit on the basis of sound and established principles.

According to the Appellants, the foundation of the Hoffman Estates' scheme is comprised of three "known and trustworthy legal facts." (Jurisdictional Statement p.5). First, the Appellants reassert their claim that the presumption contained in the ordinance passes the stringent test enunciated in *Leary* v. *United States, Id.; i.e.,* that empirical data establishes with "substantial assurance" that the presumed fact is more likely than not to flow from the proved fact on which it is made to depend." *Id.* at 36, 37. The ordinance, guidelines and evidence adduced at trial indicated that a regulated "marketing scheme" would be found whenever one or more items of a genus that police have found in the past to have been used with controlled substances were displayed; or, whenever literature considered "encouraging illegal use of cannabis or illegal drugs" was in "proximity." Applied to the Hoffman Estates' scheme the question becomes: does the "fact proved," (the retailer's "marketing scheme"), provide substantial assurance that the "presumed fact," (that the retailer's merchandise consists of "items, effect[s], paraphernalia, accessory[s] or thing[s] . . . designed or marketed for use with illegal cannabis or drugs"), is more likely than not? *Id.* at 37. The Seventh Circuit answered in

the negative, stressing that the fact allegedly proved failed to meet the threshold test. The fact to be proved is so vaguely intimated and susceptible to subjective and perhaps prejudiced interpretation that neither those who might be deemed expected to comply nor those entrusted to vigorously enforce the law would know what to expect from the other. *Grayned* v. *City of Rockford, supra* at 108, 109; *Flipside, Etc.* v. *Village of Hoffman Estates, supra* at 382. Therefore, since there is no marketing scheme defined with constitutional adequacy in the ordinance or guidelines, the operational "fact proven" can never be established.[1] The Seventh Circuit incisively distinguished the vagueness issue in the case at bar from the "rational connection" issue in *Leary. Flipside, Etc.* v. *Village of Hoffman Estates, supra* at 382. The face of the ordinance and guidelines, as well as the testimony of the Village officials at trial, proclaim the intention to establish a system of harrassment based upon several vague and irrebuttable presumptions and activated by the unguided opinions of police officers who may be offended by the arrangement of items in a display case or the "proximity" of literature that might be considered to "encourage illegal use of cannabis or illegal drugs." To premise a statutory presumption *vis a vis Leary* on such a "fact proven" was correctly adjudged untenable. *Id.* at 382.

The second "trustworthy legal fact" proffered by the Appellant in support of the subject ordinance is the

---

[1] The concept of burdening the free display of commercial offerings, especially in light of those guidelines triggering enforcement and penalty on the basis of what might be protected, commercial, symbolic or pure speech, raised First Amendment issues which were before but not discussed by the Seventh Circuit.

existence of an Illinois statute prohibiting the sale of tobacco to persons under the age of eighteen. Ill.Rev.Stat., Ch.23, §2357. Assuming that this is tendered in support of that portion of the ordinance proscribing the sale or gift of items "designed or marketed for use with illegal cannabis or drugs" to minors, the Appellee respectfully submits that the Illinois statute is irrelevant to any issue presented by this case.

The third "trustworthy legal fact" completing the cornerstones of the Hoffman Estates' enactment is the existence of an Illinois statute that exempts certain specifically defined controlled substances from the prescription requirement if certain procedures are followed. Ill.Rev.Stat., Chap. 56½, §1312. This section was adopted as part of the enactment of the Uniform Controlled Substances Act. Presumably, this statute is urged as analogous to and precedent for the subject ordinance's requirement of the police register. §1312 requires that the specifically enumerated controlled substances be dispensed only by a registered person, dispensed only to a person proven by two positive documents to be over 21 years old, and, that the name and address of the purchaser, the name and quantity of the specifically exempted product, the time and date of sale, and the dispenser's signature by memorialized. Ill.Rev.Stat., Chap. 56½, § 1312 (c)(1)(2)(3). The Department of Registration and Education form also serves as an attestation that the Schedule V purchaser has not obtained any other Schedule V substances within the proceeding 96 hours. Ill.Rev. Stat., Chap. 56½, §1312 (c)(7). The records maintained pursuant to Ill.Rev.Stat., Chap. 56½, §1312 are required by law to be forwarded to the Illinois Department of Registration and Education by the 15th day of each

following month. Ill.Rev.Stat., Chap. 56½, §1312 (c)(5). The purpose of this statute and its recording requirement is plainly to enable the state to investigate and perhaps prosecute fraudulent purchasers of specifically defined controlled substances, and to regulate pharmacists who may be inclined to violate this statute. This provision stands in stark contrast to the police register envisioned by the subject ordinance. The record in this case establishes that the admitted purpose of the Hoffman Estates' police register was to discourage the sale of items subjectively deemed by the police to be "covered." The Appellee's agent, Larry Rosenbaum, was unequivocally advised to utilize the police register for every item in his store, "for his protection." *Flipside, Etc.* v. *Village of Hoffman Estates,* 369 F.2d at 375 n.1).[2] Moreover, §1312, entitled "Dispensing controlled substances," demands prompt transmission by the

---

[2] The record establishes that items functionally indistinguishable from those sold at Flipside were sold at numerous drug hardware and variety stores throughout the Village, and that none of them had been threatened or even considered subject to application of the ordinance. The Appellants' exculpatory analogy of the subject regulation to its regulation of milk, flowers "and 68 other activities requiring licensing" (Jurisdictional Statement p.5) thus becomes transparent. An esthetic and subjective opinion deeming a particular display arrangement overly provocative will condemn one retailer while another, offering almost identical merchandise will be left unscathed perhaps because of a more favored or established status. There is thus no parallel between a regulation of milk, for example, and the subject regulation, because *all* purveyors of milk will be subjected to that type of regulation, while only retailers of "alligator clips" who offend the "marketing" sensibilities of the police will be subjected to the ordinance herein.

licensee of the required records directly to the Illinois Department of Registration and Education; whereas, the subject ordinance compels the licensee to be prepared at any time during business hours to produce at the whim of any police officer two years worth of records in which the retailer and purchaser are forced to publicly memorialize the sale of items thereby acknowledged to be "designed or marketed for use with illegal cannabis or drugs." There are no safeguards in either the ordinance or guidelines limiting the purposes and uses to which the recorded information may be put. *See Id.* at 384, 385; *Geiger* v. *City of Eagan*, 618 F.2d 26, 29 (8th Cir. 1980). Also, unlike Schedule V controlled substances, the items or design arrangements sought to be burdened by the subject ordinance are admittedly "legal retail items." (Appendix). It is readily apparent that the analogy to §1312 is inappropriate and in no manner lends credence or support to the validity of the Hoffman Estates' enactment.

The Appellants' reference to the cases of *Colten* v. *Kentucky*, 407 U.S. 104 (1972) and *Rose* v. *Locke*, 423 U.S. 48 (1975), presumably included in the Jurisdictional Statement to illustrate that some statutes have been found to pass constitutional muster in spite of their uncontested vagueness, provide no support for the system enacted by the Village. First, the enactment in *Colten* (disorderly conduct/refusal to disperse) and the enactment in *Locke* (crimes against nature) are definitely unsusceptible to a viable facial challenge — standing being only one of the legal obstacles. Second, both cases involve criminal convictions requiring the presence of a tangible *actus reus*. Both cases required a construction of the enactments in the light of fixed

and given conduct, including evidence of a wilful state of mind. In such a situation the vagueness issue is resolved by a determination whether the particular defendant, at the time he engaged in the particular conduct, would or should be aware that his conduct was proscribed by law. In the case at bar, the Appellee, Flipside, was notified that it was the target for enforcement of a new ordinance, and that the ordinance should be considered applicable to every item in its store. The ordinance and guidelines condition enforcement upon lawful activity including the display of certain literature. The Appellee cut back a significant portion of its merchandise, without exception lawful items, on advice of counsel, and instituted proceedings prospectively challenging the ordinance on its face. In both *Colten* and *Locke* the fixed conduct of the defendants was merely adjudged to be obviously contemplated by the statutes. In the instant case, the conduct, i.e. retailing things "designed or marketed for use with illegal cannabis or drugs," could not even be delineated by the Village Attorney, who drafted the ordinance and guidelines; the Village President, who broke the tie vote in the Board of Trustees, thereby enacting the Hoffman Estates' scheme; or the Chief of Police, whose stipulated testimony indicated that even he was unable to make any specific determinations as to what items are covered. Yet, the Appellee was singled out and threatened with enforcement. *Colten* and *Locke*, resolving only "as applied" challenges, are in no manner contrary to the evaluation and interpretation of the Hoffman Estates' scheme arrived at by the Seventh Circuit, and, thus, fail to raise any substantial federal issue.

The Appellants also advance the proposition that since their enactment is "but a regulatory ordinance for specific

retailers who have the opportunity of clarification prior to license application," the doctrine espoused in the case of *McGowan* v. *Maryland, supra,* should not have been discarded by the Seventh Circuit. Specifically, the proposition is that since Flipside has been deemed engaged in retailing items "designed or marketed for use with illegal cannabis or drugs," they should be apprised as to the scope of the ordinance either as a "matter of ordinary commercial knowledge" or "simply by making a reasonable investigation." (Jurisdictional Statement p.7). The suitability of imposing the burden required by the subject ordinance upon a retailer situated like the Appellee was flatly rejected by the Seventh Circuit. First, the Appellee contests the notion that it is engaged in retailing items "designed or marketed for use with illegal cannabis or drugs." Second, it is obvious that a legitimate merchant cannot simply immerse himself in the subterranean and clandestine world of drug abusers and ascertain what sort of device is deemed by actual inhabitants of this hidden world to be designed or marketed for drug use. The *McGowan* decision specifically identified an extrinsic and accessible reference source, i.e. the beach or amusement park, by which the merchant in that case could easily and reliably determine the items which could be sold on Sundays. In the case at bar no such reference source exists. *See Music Stop* v. *City of Ferndale,* 488 F.Supp. 390 (E.D.Mich. 1980); *accord Magnani* v. *City of Ames,* 493 F.Supp. 1003 (S.D. Ia. 1980). The Seventh Circuit correctly noted the inapplicability of this standard to the type of ordinance herein displayed.

The allegations of "numerous conflicts" and "wide splits of authority", and the appended list of "Recent Drug Paraphernalia Cases" (Jurisdictional Statement pp.5, 5a)

have no bearing whatsoever on the case at bar. The decisions cited are concerned only with the Model Drug Paraphernalia Act or its variations.[3] The Hoffman Estates' scheme, on the other hand, seeks to establish a strict liability system premised specifically on the nature of the individual items or the "marketing" approach adopted by a particular retailer, and is thus unrelated to any Model Act litigation. The scheme herein is *sui generis* and unaffected by any alleged disparity in decisions examining a completely different type of ordinance.

---

[3] It should be noted that subsequent to the opinion of the United States Court of Appeals for the Sixth Circuit in the case of *Record Revolution, No. 6, Inc.* v. *City of Parma et al.*, 639 F.2d 916 (6th Cir. 1980), all of the cases examining the approach adopted by the model act have been in harmony. See *General Stores, Inc.* v. *City of Albuquerque*, No. 81-0027-M (D.N.M. March 23, 1981); *Weiler* v. *Carpenter*, No. 80-637-JB (D.N.M. Feb. 11, 1981); *Lazy J., Ltd.* v. *The Borough of State College*, No. 80-1167 (M.D. Pa. Jan. 30, 1981); *Back Door Records* v. *City of Jacksonville*, No. LR-C-80-314 (E.D. Ark. Jan. 8, 1981); *Gaffey* v. *Babb*, No. CA-13882 (Ct.App.Or. Feb. 23, 1981); *The Town Tobacconist* v. *Degnan*, No. C-2198-80 (Super. Ct.Ch. N.J. March 12, 1981).

CONCLUSION

WHEREFORE, on the basis of the above, the Appellee, Flipside Records, Hoffman Estates, Inc., prays this Honorable Court to affirm the Judgment of the United States Court of Appeals for the Seventh Circuit.

Respectfully submitted,

STROUP, GOLDSTEIN, JENKINS
& PRITZKER
MICHAEL L. PRITZKER
R. BRENT DANIEL
134 North LaSalle Street
Suite 2100
Chicago, Illinois 60602
(312) 372-2225
Counsel for the Appellees.

APPENDIX

ORDINANCE NO. 969-1978

AN ORDINANCE AMENDING THE MUNICIPAL CODE OF THE VILLAGE OF HOFFMAN ESTATES BY PROVIDING FOR REGULATION OF ITEMS DESIGNED OR MARKETED FOR USE WITH ILLEGAL CANNABIS OR DRUGS

WHEREAS, certain items designed or marketed for use with illegal drugs are being retailed within the Village of Hoffman Estates, Cook County, Illinois, and

WHEREAS, it is recognized that such items are legal retail items and that their sale cannot be banned, and

WHEREAS, there is evidence that these items are designed or marketed for use with illegal cannabis or drugs and it is in the best interests of the health, safety and welfare of the citizens of the Village of Hoffman Estates to regulate within the Village the sale of items designed or marketed for use with illegal cannabis or drugs.

Now THEREFORE, BE ORDAINED by the President and Board of Trustees of the Village of Hoffman Estates, Cook County, Illinois as follows:

Section 1: That the Hoffman Estates Municipal Code be amended by adding thereto an additional section, Section 8-7-16, which additional section shall read as follows:

Sec. 8-7-16—ITEMS DESIGNED OR MARKETED FOR USE WITH ILLEGAL CANNABIS OR DRUGS

A. License Required:

It shall be unlawful for any person or persons as principal, clerk, agent or servant to sell any items, effect, paraphernalia, accessory or thing which is designed or marketed for use with il-

legal cannabis or drugs, as defined by Illinois Revised Statutes, without obtaining a license therefor. Such licenses shall be in addition to any or all other licenses held by applicant.

B. Application:

Application to sell any item, effect, paraphernalia, accessory or thing which is designed or marketed for use with illegal cannabis or drugs shall, in addition to requirements of Article 8-1, be accompanied by affidavits by applicant and each and every employee authorized to sell such items that such person has never been convicted of a drug-related offense.

C. Minors:

It shall be unlawful to sell or give items as described in Section 8-7-16A in any form to any male or female child under eighteen years of age.

D. Records:

Every licensee must keep a record of every item, effect, paraphernalia, accessory or thing which is designed or marketed for use with illegal cannabis or drugs which is sold and this record shall be open to the inspection of any police officer at any time during the hours of business. Such record shall contain the name and address of the purchaser, the name and quantity of the product, the date and time of the sale, and the licensee or agent of the licensee's signature, such records shall be retained for not less than two (2) years.

E. Regulations:

The applicant shall comply with all applicable regulations of the Department of Health Services and the Police Department.

Section 2: That the Hoffman Estates Municipal Code be amended by adding to Sec. 8-2-1 Fees: Merchants (Products) the additional language as follows:

Items designed or marketed for use with illegal cannabis or drugs	$150.00

Section 3: Penalty. Any person violating any provision of this ordinance shall be fined not less than ten dollars ($10.00) nor more than five hundred dollars ($500.00) for the first offense and succeeding offenses during the same calendar year, and each day that such violation shall continue shall be deemed a separate and distinct offense.

LICENSE GUIDELINES FOR ITEMS, EFFECT, PARAPHERNALIA, ACCESSORY OR THING WHICH IS DESIGNED OR MARKETED FOR USE WITH ILLEGAL CANNABIS OR DRUGS

Paper—white paper or tobacco oriented paper not necessarily designed for use with illegal cannabis or drugs may be displayed. Other paper or colorful design, names oriented for use with illegal cannabis or drugs and displayed are covered.

Roach Clips—designed for use with illegal cannabis or drugs and therefore covered.

Pipes—if displayed away from the proximity of non-white paper or tobacco oriented paper, and not displayed within proximity of roach clips, or literature encouraging illegal use of cannabis or illegal drugs are not covered; otherwise, covered.

Paraphernalia—if displayed with roach clips or literature encouraging illegal use of cannabis or illegal drugs it is covered.